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OBJECTIONS

TO THE

PROPOSED ALTERATION

OF THE

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RELATING TO

PRINCIPAL AND FACTOR.

BY

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As long as our laws are under the control, and require the sanction, of the united wisdom and experience of Parliament, we may hope that no sudden or improvident alteration will be made in matters of importance; but it behoves us to be on our guard against that imperceptible deterioration, which arises out of partial innovations gradually introduced; always bearing in mind, that what may appear to be desirable as an abstract proposition, may be detrimental, if introduced as a component part of a system with which it is not in accordance.

If it be the part of wisdom not to consent to any change, however unimportant it may at first appear, until it have undergone the test of in-

quiry, and be proved to be necessary, we cannot find fault with the caution which hesitates to approve of the alteration of laws, if the proposed change does not promise to be productive of good effects. The public attention has been lately called to the proceedings of a meeting of Merchants, Bankers, and others, convened for the purpose of considering the expediency of an application to Parliament to investigate the state of the English Law relating to the pledge and barter of goods by factors or agents, and to make such alterations therein as may be conformable to just principles. Certain resolutions were agreed to at that meeting, and, as I shall have occasion to refer to them in the course of the following observations, I will introduce them here.

At a Meeting of Merchants, Bankers, and Others, held at the City of London Tavern, on Thursday, the 1st of May:

JOHN SMITH, Esq. M.P. in the Chair:

It was moved by Robert Farrand, Esq. M.P. seconded by Andrew Loughnan, Esq.

And resolved unanimously, That it appears to this meeting that the merchants, bankers, and other capitalists, of this country are in the habit of making advances on

the consignment or deposit of merchandise, without that adequate protection from the British laws which the nature of the transaction and sound policy require, and which is afforded by the laws of other commercial countries of Europe.

Resolved unanimously, That the rule of the English law, from which this principally arises, viz. that a factor or agent, apparently clothed with ownership of goods, and having the power of sale, cannot pledge them or dispose of them by barter, seems to have originated in cases determined in the last century, wherein the decision turned principally on collusion between the factor and the individuals with whom the goods were deposited; that it has, in subsequent cases, been applied by courts of law in a manner which, it is conceived, could not formerly have been contemplated; and that of late the principle has been carried to an extent which exposes all such advances to risks against which no prudence can guard.

Resolved unanimously, That it is not the object of this meeting, directly or indirectly, to prevent the proprietor of goods from controlling his agent as to the mode of disposing of the property intrusted to him, nor to protect the latter from the legal consequences of his breach of trust; on the contrary, it may be proper to visit such dereliction of duty with a punishment similar to that imposed by the act passed in the 52d year of his late Majesty's reign, c. 63, entitled "An Act for more effectually preventing the embezzlement of securities of money and other effects, left or deposited for safe custody, or other special purpose, in the hands of bankers,

merchants, brokers, attorneys, or other agents;" but it is strongly the opinion of this meeting that, if a loss must fall upon one of two innocent parties, the principal should be bound by the acts of his own agent, rather than to place the consequences of those acts upon persons who give credit to the property, and not to the agent personally.

Resolved unanimously, That it is expedient to apply to Parliament without delay, to investigate the state of the English law on this subject, and to make such alterations therein as will render the same conformable to just principles; that the petition now read be approved, and that a committee be now formed to adopt such measures as they may think expedient for giving effect to the object of this meeting.

Resolved unanimously, That the following gentlemen do constitute the said Committee, with power to add to their number, viz.—

Richard Birkett, Esq.	Andrew Loughnan, Esq
James Cook, Esq.	John Martin, Esq. M.P.
Lewis Doxat, Esq.	R. H. Marten, Esq.
Rt. Farrand, Esq. M.P.	J. Plummer, Esq. M.P.
Peter Free, Esq.	Clement Ruding, Esq.
J. H. Freese, jun. Esq.	Richard Ryland, Esq.
Geo. Carr Glyn, Esq.	S. Scott, Esq. M.P.
John Hall, Esq.	Benjamin Shaw, Esq.
W. Alers Hankey, Esq.	John Smith, Esq. M.P.
E. B. Kemble, Esq.	T. Wilkinson, Esq.
John Kymer, Esq.	T. Wilson, Esq. M.P.
Max. R. Kymer, Esq.	Thos. Wilson, Esq.
Joshua Lockwood, Esq.	

Resolved unanimously, That Messrs. Kaye, Freshfield, and Kaye be appointed the solicitors to conduct the measures consequent upon these resolutions.

Resolved unanimously, That the thanks of this meeting be given to Robert Farrand, Esq. M.P. for his attention to the subject, and the zeal and ability with which he has introduced it to the consideration of this meeting.

JOHN SMITH, Chairman.

Resolved unanimously, That the thanks of this meeting be given to John Smith, Esq. M.P. for his able and impartial conduct in the chair.

It would ill become me to impute to those who require the proposed change, the improper motive of desiring greater facility in disposing of the property of their principals for their own purposes; and I hope that no unguarded expression of mine will convey such an imputation. The object of these gentlemen may fairly be considered as threefold—to protect themselves, as *pawnees*, against the fraudulent conduct of factors;—to do away with the necessity of the express authority of the principal, in cases of pledge, for the purpose of reimbursing the factor for advances made by him on account of goods consigned to him for sale; and to remove the difficulty which now subsists of obtaining advances upon the pledge of their *own* goods, in consequence of the suspicion

which arises that they are not the property of the person offering them, but are liable to be reclaimed by the owner. If the proposed alteration of the law could attain these objects without injustice to the principal, and without opening to the dishonest factor a way by which he could more easily defraud his principal than he can at present, it would perhaps be difficult to prove that the parties who seek this change are not justified in so doing; but as I think it would be unjust towards the principal, and would enable the dishonest factor more easily to defraud him, I have been induced to consider the consequences of the proposed change, and for this purpose have endeavoured to make myself acquainted with the existing law upon this subject; and, thinking that the information may be useful to those persons who have not the law books at hand to which I have had recourse, I will give as full a statement of the cases as is necessary for a correct understanding of the subject.

It is now decided law, that a factor to whom goods are intrusted for sale cannot pledge them without authority from his principal; and, although no reported case is to be found in which this is expressly decided before that of Paterson *v.* Tash, which was in the year 1742, yet this

law is recognised at an earlier period in Marsden *v.* Panshall, 1 Vernon's Reports, 407, in the year 1686; and the order made by the Court of Chancery in this cause shows, that the law was not then questioned. Considering how much our laws are indebted to the civil law, it is probable that the principle was borrowed from thence by our lawyers at an early period, and that the rule de executione mandati, "Is qui exequitur mandatum non debet excedere fines mandati," *Justin. Instit.* lib. iii. tit. 27. s. 8. was early ingrafted into our common law. It was said by Lord Loughborough, in De Bouchout *v.* Goldsmid, 5 Vesey, 213. "I take it not merely to be a principle of the law of England, but by the civil law, that if a person is acting ex mandato, those dealing with him must look to his mandate." In the case mentioned of Paterson *v.* Tash, which is reported in the second volume of Strange's Reports, p. 1178. it was held by Lord Chief Justice Lee, "that though a factor had power to sell and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt." This was laid down by the Chief Justice not as a new principle, but as a well-known rule of law at that time; and, although that was only a nisi prius

decision, it is supported by all the subsequent decisions in the King's Bench relating to this point. In the absence of prior cases which contravene this principle, it is fair to assume that it had a much earlier origin than the period at which it first found its way into a law report. In Newsom *v.* Thornton, 3 East's Reports, 17, in the year 1805, it was contended, that the possession of the bill of lading without any special indorsement designating the consignee as factor for another person, gave him the absolute control over the property, so as to pass it by indorsement and delivery to a third person for a valuable consideration, without notice; and that a pledge by the factor of such bill of lading was binding upon the principal upon this ground, " that if one man put it in the power of another to cheat a third person, he must abide the consequences, and it is the less necessary to make an exception to the general rule in the case of a factor, because the principal may always prevent the mischief by making a special indorsement to his correspondent by the name of his factor, which will give notice of the transaction to every person into whose hands the bill of lading comes."

But Lord Ellenborough, in pronouncing his judgment on that case, said, " If the factor had

been in possession of the goods themselves, and had purported to sell them to the defendants bonâ fide, the property would have passed by the delivery, but not if he had only meant to *pledge* them, because it is beyond the scope of a factor's authority to pledge the goods of his principal. The symbol then shall not have a greater operation to enable him to *defraud* his principal than the actual possession of that which it represents." Mr. Justice Grose said, in the same case, "It is admitted that a factor cannot pledge the goods of his principal by delivering of the goods themselves; then is it not inconsistent to say he may do so by delivery of the bill of lading?" Mr. Justice Lawrence said, "The question is, whether, if a factor have no property in the goods of his principal, so as to dispose of them otherwise than according to the authority delegated to him, namely, by sale, he can have a greater disposing power over them by means of his possession of the instrument which gives him authority to receive them, than the possession of the goods themselves, when received, would give him?"

Here then is a decided case that the symbol of property cannot be pledged by a factor without authority to do so, resting, by analogy, upon the principle that the property itself could not be so pledged.

In Martini *v.* Coles and others, 1 Maule and Selwyn, 140, the plaintiff had consigned goods from Demerara to Vos, his correspondent and factor in London, by the terms of the bill of lading to be delivered to Vos or his assigns. The plaintiff sent one of the bills of lading, inclosed in a letter, directing Vos, after the sale of the goods, to place the proceeds to his credit. Vos indorsed the bill of lading to the defendants, and afterwards delivered it and the goods to them. The defendants made advances to Vos on account of the goods, having no knowledge that he was not the owner. Vos was a general merchant as well as broker, and usually employed the defendants as general brokers in the sale of West India produce. Vos afterwards became bankrupt, the goods remaining unsold in the hands of defendants. Upon notice by plaintiff of his claim as owner, and a demand by him of the delivery of the goods, the defendants refused to deliver them without payment of the debt due to them from Vos. It was contended for the defendants that this case was distinguishable from Newsom *v.* Thornton; for there the bill of lading was to the order of the shippers, whereas here it was to Vos himself, who might, therefore, on that account, coupled with their knowledge of his dealings as a mer-

chant, reasonably be mistaken by the defendants for the owner of the goods: that as to the argument that they might have ascertained the fact by inquiring for the letters, it is sufficient to say that the practice is unusual, and would not be tolerated in commercial dealings: that the plaintiff might have prevented all mistake by specially indorsing the bill of lading to Vos as factor: that as a factor who has authority to sell the goods has a lien for his advances upon them, and may retain for such advances, in like manner he may authorise another, to whom, as broker, he commits the goods for the purposes of sale, and who makes advances upon them, to retain also: that it is for the interest of the consignor that the broker should have this authority, as it will facilitate the raising money to answer the bills of the consignor; otherwise the goods must frequently be sold to a disadvantage, instead of waiting for the best market.

It does not appear that any answer was given to the last argument by the counsel for the plaintiff, though it is noticed by the court; but as to the practice of inquiry being unusual, it was said, "that if the pawnee chose to abstain from making inquiries, either from motives of interest, or from the practice of his trade, he must take the consequence: and as to the spe-

cial indorsement of the bill of lading for the protection of the consignor, that it has never been held necessary; and that the symbol of property cannot tend to mislead more than the possession of the property itself." Lord Ellenborough, in his judgment, said, " It is the case of a consignment to Vos by bill of lading without specifying that the consignment was made to him in respect of any particular character he bore. It is, indeed, much to be regretted that a bill of lading, instead of being launched into the world as an instrument of equivocal import, should not have designated upon the face of it in what character the consignment is to be made, where it is intended that the consignee should fill that of factor only. If that had been done in this case, it would have obviated all doubt. However, when we get at the substance of the transaction, as it now stands, it amounts to this, that the parties stood only in the relation of principal and factor. But it has been decided ever since the case of Paterson *v.* Tash, that a factor cannot pledge. Perhaps it would have been well if it had been originally decided, that, where it was equivocal, whether a person was authorised to act as principal or factor, a pledge made by such a person free from any circumstances of fraud was valid. But

it is idle now to speculate upon this subject, since a long series of cases has decided that a factor cannot pledge."

Mr. Justice Le Blanc said, " whether it might not originally have better answered the purposes of commerce, to have considered a person in the situation of Vos, having the apparent symbol of property, as the true owner, in respect to that person who deals with him under an ignorance of his real character, is a question upon which it is now too late to speculate, since it has been established by a series of decisions, that a factor has no authority to pledge, whether the person to whom he pledges has or has not a knowledge of his being factor. The bill of lading conveyed to Vos, or his assigns, no further authority over the goods than the party who consigned them intended to clothe him with." " It has been said, that it would be for the benefit of the consignors abroad, that their factors should have authority to pledge the goods of their principals, because their consignments are frequently accompanied with a bill drawn on the factor for a part of the price of such consignments. If indeed advances were made merely to take up the bill of the consignor, and were appropriated to that purpose, there would be no mischief; and that might be con-

sidered in furtherance of the authority given by the principal; but if a party make advances to a factor without inquiring for what purpose they are made, he must be contented to rest on the authority with which it shall appear that the factor is clothed."

Mr. Justice Bayley said, "I am of the same opinion; a factor has authority to sell, but not to pledge, and therefore, a person who takes a pawn of a factor takes it at his peril. If the principal does any thing to induce the person to believe the factor really the principal, that would be a different case. Cases may perhaps exist where a principal would be bound by a pledge made by his factor; but supposing one of those cases to be where money has been advanced in payment of a bill drawn by the principal for part of the price of the goods, it is not so found here; on the contrary, the claim is in respect of general advances (to the factor), and if it had been so found, I do not say that it would have made any difference. It has been said, that as a general rule it would be for the benefit of the consignor, that the factor should have authority to pledge; that I deny; *for it would not be for the benefit of the consignor, that a factor should have authority to pledge for his own debt.* But it is unnecessary to discuss that point, as it is quite

clear that, unless the consignor abroad gives the factor a special authority to pledge, he has no such authority himself."

In Kuckein *v.* Wilson, 4 Barnewall and Alderson's Reports, 443, in the year 1821, a quantity of oats having been consigned by the plaintiff, a Prussian merchant, to be sold by S. and Co. of Hull, who were merchants as well as factors, they placed them in the hands of the defendant, a corn factor, as a security for advances made by him, but the oats were not to be sold without the consent of S. and Co. They remained in the defendant's possession upon these terms for nine months, when the defendant agreed to purchase them at the market price. No money actually passed, nor were any account sales rendered, but the amount of the price was allowed in account between S. and Co. and the defendant, leaving a balance in favour of the latter. Held that this was in substance a pledge, and not a sale by the factor; and that no property passed to the defendant, although the jury had found it to be a bonâ fide transaction. Lord Chief Justice Abbott, after stating the evidence, said "there appears to be none of the ordinary characteristics of a mercantile sale; the price being not actually paid by Wilson, and it being manifest that there was no intention that it should

be paid, the intervening transactions amount to nothing more than an agreement, that the pawnee should take the pledge to himself at a fixed sum, to be set against the money that he had advanced upon the security of the pledge. Such an agreement does not in our opinion alter the nature of the original transaction, which was clearly a pledge, and the case may and ought to be decided in favour of the plaintiff upon the general principle, which does not allow a factor to pledge."

These are the chief cases which are reported upon the subject of pledge by the factor of the goods of his principal.

As the question of barter is alluded to in the above resolutions, it may be satisfactory to those who are unacquainted with the law in this respect, if I shortly advert to it. It is an unusual mode of dealing, and therefore not of frequent occurrence. So lately as the year 1820, it was determined, in the case of Guerriero *v.* Peile and another, 3 Barnewall and Alderson's Reports, 616, that a factor has an authority to sell for money, but not to barter, and therefore, where a factor barters the goods of his principal, no property passes, and the principal may maintain trover against the party with whom the goods are bartered, although the latter be wholly ignorant, that he

had been dealing with a factor only. Lord Chief Justice Abbott at the trial told the jury "that if they were of opinion that the defendants knew the character of the party to be that of factor, they should find for the plaintiff; but if the defendants did not know that fact, and the jury thought that the transaction was in the ordinary course of trade, when parties are dealing with their own commodities, they would find for the defendant." The jury found a verdict for the defendant, which was afterwards set aside, the Chief Justice agreeing with the other judges, that he ought to have told the jury that it was a transaction of barter, and that the plaintiff's property was not divested, because a factor has no authority to barter. The rule to set it aside was moved for on the authority of an anonymous case in 12 Mod. Rep. 514, in which Holt, C. J. decided, that every factor, of common right, is to sell for ready money, unless the usage be otherwise. But if there be no such usage, and he, upon the general authority to sell, sells upon trust, let the vendee be ever so able, the factor is only chargeable; for in that case, the factor having gone beyond his authority, there is no contract created between the vendee and the factor's principal; and such sale is a conversion in the

factor; and if it be not in market overt, no property is thereby altered, but trover will also lie against vendee; so likewise, if it be in a market overt, and vendee knows the factor to sell as factor. And on the authority of Wiltshire *v.* Sims, 1 Campbell's Reports, 258, which was tried before Lord Ellenborough in the year 1808, and it was there determined that an agent employed generally to do any act, is authorised to do it only *in the usual way of business;* therefore, as stock is sold usually for ready money only, a broker employed to sell stock, cannot sell it upon credit without a special authority, although acting bonâ fide, and with a view to the benefit of the principal. Lord Ellenborough said, "the broker here sold the stock in an *unusual* manner, and, unless he was expressly authorised to do so, his principal is not bound by his acts."

The authorities, which I have thus fully cited, are sufficient to convey a perfect notion of the law, as it affects the right of factors to pledge or barter the goods of their principals, and sufficiently illustrate the rules upon which that law is founded: from whence it is apparent that a factor, to whom goods are sent for sale, can neither pledge nor barter the goods of his principal, unless he is authorised by his principal to do so. As this is a law for the protection

of the principal, it must necessarily be strictly construed, and will not admit of any qualification arising out of the want of knowledge of the relation of factor. It is a law in restraint of the factor, and compels him to keep within the bounds of the authority delegated to him.

But it is said,* " That if a loss must fall upon one of two innocent parties, the principal should be bound by the acts of his own agent, rather than to place the consequence of those acts upon persons who give credit to the property, and not to the agent personally." And this is a summary of the argument, upon which those, who desire an alteration of the law, rest their claim. Let us then see how it bears upon the relative characters of principal and factor, in the various transactions which arise out of that relation.

It will not, of course, be contended, that the principal should be deprived of the power of reclaiming his goods from the hands of a *pawnee*, who has made advances upon them to the factor, with notice that they were not the factor's own goods, and that he had no authority to pledge them. In such case, the pawnee would have no pretence, in common honesty, that could justify his detention of the goods from the principal; and it is clear, that such an excess of authority, with the knowledge of the pawnee,

* See Resolutions, p. 6.

could create no contract between him and the principal, against whom, therefore, he could have no title. As little pretence would the pawnee have to retain the goods of the principal, who had not authorised his factor to pledge, although the pawnee had no notice of a principal, or of the absence of such authority, if he has made advances without inquiry, and has neglected to take any steps for the purpose of ascertaining the character of the party, whether factor or owner, to whom he has made advances on such deposit of the goods. If he might have ascertained this by inquiring for the documents authenticating the ownership of the goods, and the pawnee chose to abstain from making such inquiry, he must take the consequence, and must abide by the event of the authority with which the factor shall appear to be clothed.

It will be admitted, therefore, that in neither of these two cases would the pawnee have any right against the principal. In the first, the transaction takes place with full knowledge of the want of authority in the factor; and, in the second, the neglect to acquire such knowledge, when he might have done so, necessarily deprives the pawnee of the right to set up the want of it against the claim of the principal.

I will now, however, suppose a transaction in which the pawnee has used every precaution

which a prudent man would take, in demanding to see the documents of ownership, and in making every necessary inquiry; and having done so, is induced, by the false representation of the factor, to consider him as the owner, and to make advances to him on pledge of the goods, in the full belief that he alone is owner. This is the case to which my mind adverted, when I supposed that it was one of the objects of those who seek to alter the law, to protect themselves, as pawnees, against the fraudulent conduct of factors. But upon what known rule in our law, are they entitled to such protection? Is it "that if a loss must fall upon one of two innocent parties, the principal should be bound by the acts of his own agent, rather than to place the consequences of those acts upon persons who give credit to the property, and not to the agent personally?"* The principal, by the law of England, is bound by the acts of his agent, within the scope of his authority, as is to be found everywhere in our law books; but if the agent exceed his authority, the principal is not bound. See Fenn *v.* Harrison, 3 Term Reports, 757, and Baring and others *v.* Corrie and another, 2 Barnewall and Alderson, 137.† The conduct of the factor in

* See Resolutions, p. 6.

† There is an exception to this in the cases of tranfer of bills

the transaction last alluded to, being unauthorised by the principal, is a spoliation of the principal; and what says 2 Inst. 714.? "Spoliatus debet ante omnia restitui;"—"the old rule caveat emptor doth hold herein;" and "when two rights come together, the ancient right is to be preferred." The language of the resolution above mentioned, presumes that, by the rule of law, property follows the possession; but that is not so. There is no instance in the law, where an unauthorised disposition of the goods of another person, made by the mere possessor of them, has been held to transfer the property of the owner, excepting those cases where goods are sold in market overt. "Possession of goods is primâ facie evidence of title, but that possession may be precarious, as of a deposit; it may be criminal, as of a thing stolen; it may be qualified, as of things in the custody of a servant, carrier or *factor*. Mere possession, without a just title, gives no property; and the person to whom such possession is transferred by delivery, must take his hazard of the title of the

of exchange, the right of property in which passes with the bills. This was necessary to make them negotiable, and in this respect they differ essentially from goods of which the property and possession may be in different persons. See Collins v. Martin and others, 1 Bosanquet and Puller's Reports, 648.

author." By Lord Loughborough, in Lickbarrow *v.* Mason, 1 Henry Blackstone's Reports, 360.

A variety of cases might be cited for the purpose of showing, that the owner of property cannot be dispossessed of it by the unauthorised act of his agent with whom it is deposited for a special purpose. Thus in the case of Hartop *v.* Hoare and another, reported in 3 Atkyns, 45, Sir John Hartop, in 1729, lodged jewels, for safe custody, in the hands of Seamer a jeweller, inclosed in a sealed paper, and put in a bag which was also sealed with Sir John Hartop's (the plaintiff) seal, and deposited at Seamer's house; and the same day his clerk gave a receipt for them. In February, 1735, Seamer broke both the seals, took out the jewels, and carried them to Hoares the bankers (the defendants), borrowed £300 upon them, and deposited the goods as his own proper goods, and as a security for the £300, and gave his promissory note for the same sum. On Hoares refusing to deliver the jewels to Sir John Hartop, he brought an action of trover and conversion against them; the jury, having a doubt whether the defendants were guilty, found a special verdict; upon which the court of King's Bench gave an unanimous judgment for

Sir John Hartop the plaintiff. The judgment was pronounced by Chief Justice Lee, who, after stating a variety of cases for the purpose of showing that a mere possessor of goods cannot confer a title by a sale which he is not authorised to make, says, " The true owner of goods does not lose his property by a sale made by the possessor of them, unless it were in market overt; and in the cases stated (by the Chief Justice) no regard is had to the vendee's ignorance of the vendor's want of title; no regard to the vendee's coming rightfully to them as a purchaser without notice; no regard to the vendor's having the lawful possession of them." None of which circumstances could have any effect upon the rule of the law, that mere possession can confer no title by an unauthorised sale.

Although the argument of Chief Justice Lee depends upon cases of unauthorised sale, it is equally applicable to cases of unauthorised pledge; they are both acts beyond the scope of the authority of the agent, and cannot bind the principal.

In Hoare and another *v.* Parker, 2 Term Reports, 376, the case was thus—the plaintiffs, who claimed under a remainder man, brought an action of trover for plate against the defen-

dant, to whom it was pawned by tenant for life, without any notice of the settlement; and the defendant advanced money upon it. After the death of tenant for life, the defendant refused to deliver it up to the plaintiffs who so claimed under the remainder man, and the question was, whether the defendant was bound to deliver up the plate without being paid the money he had advanced upon it. Baldwin, the counsel for the defendant, declared that he could not argue against so established a point; and the court said, " this point is clearly established, and the law must remain as it is, till the legislature think fit to provide that the possession of such chattels shall be proof of ownership." And the plaintiffs recovered the plate.

It is clear then that the law of England recognizes no such principle as that suggested in the Resolutions; and most injurious would it be to the commerce of this country if such a principle should ever become the foundation of a law, enabling the factor, who is employed only to sell, to pledge the goods of his principal. It must readily occur to all persons conversant with the trade of this country, that great confidence is placed in agents by principals for the purpose of selling their goods, extending over millions of property in the course of a year.

What a state of alarm it would place those principals in, if they were deprived of the protection which the law now affords them, and their agents, when possessed of the symbol of property in the shape of the bill of lading, or of the property itself, could pledge for their own purposes, and thereby give the pawnee a title against the owner of the goods! It is no satisfaction to the owner to tell him, *your remedy is against the factor:* dishonesty in him is often the immediate forerunner of bankruptcy; and it rarely happens that one, who is driven to dishonest shifts for the purpose of raising money by pledging another man's goods, continues long in a state of solvency. The measure proposed in the Resolutions, of subjecting such delinquents to the severity of a penal law,* might operate upon the fears of some few; but I believe that experience of human nature will tell us, that penal statutes are no great restraint where there is great facility in committing the offence; and it is a poor satisfaction to the principal, who has been defrauded by his agent, to have the privilege of transporting him for seven years, instead of the right to recover his property from a *pawnee* who has advanced money

* See Resolutions, p. 5.

upon it to one who had no authority to pledge it.

It is said, however, in the Resolutions, "That the rule of the English law has originated in cases determined in the last century, wherein the decisions turned principally on *collusion* between the factor and the individuals with whom the goods were deposited; that it has in subsequent cases been applied by courts of law in a manner which it is conceived could not formerly have been contemplated."*

This is altogether a mistake. There is no reported case during the last century in which the decision turned principally on such collusion, except that of Wright and another, assignees of Scott, *v.* Campbell and another, 4 Burrow's Reports, 2046, in the year 1747, which may be shortly stated thus:—Fontaine, a merchant in London, consigned goods to Swanwick, his factor, at Liverpool, who, before the arrival of the goods, received a bill of lading thereof indorsed to him, or order, by his principal, Fontaine. If Swanwick sell the goods, even while at sea, to a bonâ fide purchaser, for a valuable consideration, Fontaine cannot, in case Swanwick become bankrupt, follow his goods

* See Resolutions, p. 5.

into the hands of such purchaser: but if Swanwick assign the bill of lading to a third person (Scott), in satisfaction of a debt due from Swanwick to him, and that third person has notice that Swanwick is factor only to Fontaine, he is guilty of a fraud in receiving goods in payment from Swanwick which he knows Swanwick has no authority to dispose of. Lord Mansfield said, "The whole of the case turned upon the question, whether this was a fair transaction, bonâ fide, between Swanwick and Scott, for a valuable consideration, and without notice, or a trick and contrivance between them to cheat an honest owner out of his property." And this, which was a material fact, was not stated in the special case. The court agreed that there seemed to be a fraudulent collusion between Swanwick and Scott, but that the facts were not sufficiently stated, and granted a new trial; the verdict having been for the plaintiffs upon the first trial.

There is no printed report of this second trial; but I have a note in which I find that, in Hayward v. Stewart, Hilary Term 28 George III. in the Exchequer, Mr. Baron Thompson said, "this cause was tried again, and a verdict given for the defendants on the ground of fraud." This is the only case I am aware of in which a

fraudulent collusion was the *principal* ground of the decision. But the true rule of the law, which protects the consignor from the unauthorised acts of his factor, is clearly distinguishable in this case, and prevailed throughout it: a true and just principle, in my opinion, and one which must ever have been contemplated from the first period of its introduction, as a safe and infallible guide in all subsequent cases; a principle which, if it were departed from, would in its relaxation have an extensive influence upon other settled rules of law, respecting the conduct of agents, and would have the effect of crippling the transactions of merchants, by destroying that security which the principal now has in the protection which the law affords him against the agent, in those cases in which he exceeds his authority. But, say the Resolutions, "this principle has of late been carried to an extent which exposes *all* such advances to risks against which *no prudence* can guard."*

Is this so? In the case last mentioned, Wright and another, assignees of Scott, *v.* Campbell and another, Lord Mansfield said, "Scott *never inquired* into the fact, whether Swanwick had really bought the goods, or was the real

* See Resolutions, p. 5.

owner of them. It is indeed stated that Swanwick told Scott, 'that the goods were his own, and that he had paid for them;' but did Scott believe him? that does not appear—he trusted to Swanwick's word; no letters were produced; no price fixed."

In Daubigny and others *v.* Duval and another, 5 Term Reports, 604, which was tried before Lord Kenyon, the defendants attempted to prove that Davallon, the factor, had express authority by letters from the plaintiffs (his principals) to pledge the goods in question, but they failed in that proof.

In Newsom *v.* Thornton, before mentioned, Justice Lawrence said, "in this case there is no ground to complain of the defendants having been deceived by means of the bill of lading, for it would have been very easy for them to have inquired for the letter of advice, which brought it, which would have shown that Church held it as factor, and not as vendee of the goods; *and if persons will neglect all precaution, and advance money on goods without inquiring whether the party had any right to dispose of them or not, they must bear the loss, if it turn out that he has no authority so to do.*" It seems then that ordinary prudence may guard against risk in making advances in such cases. If the result of inquiry

be that the factor is not owner of the goods offered in pledge, the pawnee has no pretence for protecting himself on account of such advances against the claim of the principal. If the inquiry lead to a suspicion that something is withheld, and that he who requires the advance is neither owner of the goods offered in security, nor factor with authority to pledge, a *prudent* man will repudiate such a transaction.

I know, however, that it has been said, and great reliance is placed upon this matter by those who support the proposal for altering the law, that cases may occur in which no precaution on the part of the pawnee can protect him: and the instance relied upon is that of a consignee, resident in a foreign country, who has received a consignment from his correspondent to dispose of by sale, and who ships the goods so entrusted to him for sale, consigning them *as his own* to a merchant in England, to hold at his disposal, and draws bills upon that merchant, who makes advances to the amount of those bills upon the faith that the goods are the property of the foreign consignee, and wholly ignorant of his character as factor. But what is there in this transaction, excepting the distance at which the parties may be from each other, which distinguishes this case from the fraudulent misre-

presentation of any other factor? If the foreign consignee is determined to keep all knowledge of his character of factor from the English merchant, and he trusting to his integrity deal with him as a principal, what is there that distinguishes this case from the like confidence reposed in the integrity of the home factor? A prudent merchant, in either case, does all in his power; he makes inquiry before he consents to advance money on goods, which may be the property of a third person; but, if he be deceived, whether it be by the foreign or home factor, what difference does this make in the application of the rule of the law of this country, *that a principal is not bound by the unauthorised act of his agent?*

It has, indeed, been said by Lord Ellenborough,* " Perhaps it would have been well if it had been originally decided, that, where it *was equivocal whether a person was authorised to act as a principal or factor,* a pledge made by such a person, free from any circumstances of fraud, was valid." And Mr. Justice Le Blanc inclines to the same opinion.† But if such a pledge was valid, the equivocal character ought to appear either from the documents of ownership, or the

* See pp. 14 and 15. † See p. 16.

total want of them, in the hands of the consignee. If the principal, wishing not to appear as owner, so frame those documents as to mislead the inquirer, and thereby enable the consignee, his factor, to appear as proprietor of the goods, in such case the principal is guilty of deception, and ought to bear the loss, if any arise out of the misconduct of the factor in disposing of the goods. So, if a principal act so imprudently as to trust a factor with goods unaccompanied by any written documents, and the factor practise the deceit of disposing of the goods as his own, if any body is to be a loser by this deceit, it is more reasonable that he who enables the deceiver to practise the deception should be a loser than a stranger. In Fitzherbert *v.* Mather, 1 T. R. 16, Mr. Justice Buller said, " It is the common question every day at Guildhall, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit?" Now when a principal consigns goods to a factor, with accompanying documents authenticating his ownership, and the factor practises deceit by falsifying such documents, and disposes of the goods as his own to the person deceived by such falsification, it is the person to whom the goods are so disposed of who puts a trust and

confidence in the honesty of the deceiver, and he should be the loser, not the principal, who, having taken every necessary precaution, ought not to be affected by the fraudulent conduct of the factor. In such a case as that which is suggested by Lord Ellenborough, if it could be clearly established, that the owner had *by his conduct enabled* the factor to appear as proprietor of the goods, and by that means to impose on a third person without any fault on the part of that person, he might be sufficiently protected by a court of law construing such conduct of the owner as a general unlimited authority to the factor to use his discretion in the disposal of the goods, amounting to a permission to pledge them, if necessary. And if a proper case should arise for such a construction, it might be made under the rules of the common law, as applied to the transactions of merchants, without resorting to any statutory law for the purpose. It is the peculiar advantage of a lex non scripta that it accommodates itself to cases as they arise, which could never be sufficiently comprehended in any code of written laws; and the particular case which would justify a written law ought to be such as cannot, by any fair construction, be included within the rules of the common or unwritten

law; if it can, the written law is unnecessary and no statutory provision is called for.

It is also a supposed case of hardship, where the factor in this country has advanced money to his principal upon the goods consigned to him for sale, and the state of the market is such as precludes a sale without sacrificing the property of the principal; in which case it it has been said that the factor should have the power of pledging the goods of his principal to the amount of his advances upon them: But what need is there to alter the law for this purpose? The factor has only to provide himself with the authority of the principal to pledge the goods, and then making his character unequivocal, he avoids any sacrifice of the property of his principal, and awaits a better state of market; that this is sometimes done in case of low markets in London, must be well known to all persons conversant with the trade of that city. Armed with such an authority, the factor has no more difficulty in obtaining advances, and *perhaps* not so much as he would have if he sought them on account of his own goods; for the production of the authority removes the suspicion which may arise in some cases, where a party offers to pledge his own goods.

And this leads me to another supposed case

of hardship said to arise out of the present rule of the English law, namely, that it places difficulty in the way of obtaining advances upon a merchant's own property by way of deposit. That this difficulty exists to any injurious extent I do not believe; or that a merchant of character is at present deprived by the operation of the law of England in this respect from obtaining advances by way of deposit of his own goods as a security. I can suppose that a merchant of blemished reputation may be under some difficulty in effecting such a transaction; but not more so in this than in *any* other particular. He who deals with men of bad character necessarily does so at his peril, and is cautious; and surely it is no small objection to a relaxation of the principle of this law, that it will facilitate fraud.

There is no greater error in legislation than in granting particular privileges without regard to general interests. If the effect of the particular privilege be to render general interests less secure, it must be a case of very great necessity in the particular instance that will justify the interposition of a law in favour of it. Does such necessity occur in the last-mentioned instance? It is for those who ask for the in-

terference of the legislature to prove that it does. There are many rules of law which impose restraint upon the dealings of honest men whose interests may be affected by them if they chance to deal with rogues; and the maxim caveat emptor is of extensive application in our law. The rule of law laid down in Hern *v.* Nichols, 1 Salk. 289, " that where one of two innocent persons must suffer by deceit, he that first employs and puts a confidence in the deceiver should be a loser rather than a stranger," as was said by Mr. Justice Holroyd in Baring and others *v.* Corrie and another, 2 Barnewall and Alderson, 148, " must be taken with some qualifications; as, for instance, if a factor, even with goods in his possession, acts beyond the scope of his authority and pledges them, the principal is not bound; or, if a broker having goods delivered to him is desired not to sell them, and sells them, but not in market overt, the principal may recover them back. The truth is, that in all cases, excepting where goods are sold in market overt, the rule of caveat emptor applies."

The topics connected with the subject of these observations would, if pursued in all their various relations to the law of this country, and

the usage of merchants, require a much fuller investigation than I have proposed to undertake at present. My object in now publishing them is, that I may distribute information which may be useful to others in forming their opinions upon the question, which appears to be followed up with a precipitancy not consistent with an object of so much commercial importance, and upon which it would be unwise to legislate without the fullest inquiry and deliberation.

The meeting of the merchants was on Thursday, the 1st of May. It was suggested at the meeting that it would be desirable to use expedition; and that this suggestion has not been disregarded is apparent in the rapid steps which have been taken.

The Resolutions were published on Wednesday, the 7th of May; a petition was presented by the Chairman of the meeting of Merchants, to the House of Commons, on Monday, the 12th of May, who, after presenting it, gave notice of a motion for the following day for the appointment of a Committee. In consequence of there being no house on Tuesday, the motion of the honourable member did not take effect; and on Friday, the 16th of May, he moved for

a committee to inquire into the state of the law relating to goods entrusted to merchants as agents or factors—and a committee was named. It was observed on this occasion, that brokers and not consignees, were the parties interested in the measure which was the object of the petition. Upon this matter I express no opinion; it does not signify whose particular interest it is; if it be injurious to the general interests of commerce, the latter DEMAND PROTECTION.

It is in consequence of the active measures which have been taken to procure an alteration of the law, that I have been induced to publish these observations without delay, in the hope that they may have the effect of inducing those to whom the duty of legislation is entrusted, to make due inquiry, that they may be satisfied, before they give relief in a particular instance, that the case calls for their interposition, and that an alteration of the existing law can be made without affecting the interests of the principal. The law, as it is now interpreted, protects the foreign merchant against fraud, and forms a valuable part of that excellent system of jurisprudence, which has raised the commercial law of this country so high in the estimation of foreign nations; affording security

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